

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI E BENCH, MUMBAI**

**[Coram: Pramod Kumar (Vice President),
and Sandeep S Karhail (Judicial Member)]**

ITA No. 7823/Mum/19
Assessment year: 2015-16

Stemade Biotech Private LimitedAppellant
*501, Winfall Sahar Plaza, Andheri Kurla Road
J B Nagar, Andheri East, Mumbai 400 059
[PAN: AANCS1957N]*

Vs.

Deputy Commissioner of Income Tax
Circle 11(2)(2), MumbaiRespondent

Appearances by:

Vishwas Mehendale *for the appellant*

Abhijeet Chaudhury *for the respondent*

Date of concluding the hearing : 17/05/2022
Date of pronouncing the order : 20/05/2022

O R D E R

Per Pramod Kumar VP

1. By way of this appeal, the appellant has challenged the correctness of the order dated 30th September 2009, passed by the learned Commissioner (Appeals) in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2015-16.

2. Notwithstanding the final word spoken by the Hon'ble Supreme Court in the case of **Apex Laboratories Pvt Ltd [(2022) 442 ITR 1 (SC)]** on the issue of tax-deductibility of freebies etc to medical practitioners, and notwithstanding the amendment made in the related tax law provision by the Finance Act 2022, many would not let the litigation come to an end until the legal ingenuity is exhausted- which is always a good distance away. The amount involved in this appeal may be relatively small at Rs 9,61,140, but the issue raised in the appeal does seek to reignite, what many believe to be, a controversy laid at rest. We must, therefore, deal with the issue in appeal in some detail.

3. Grievance of the appellant, as raised in grounds of appeal numbers 1 and 2 and in substance, is that the authorities below erred in holding that referral commission paid to doctors is in violation of the professional conduct under the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002, and, as such, inadmissible as a tax deduction under section 37 of the Income Tax Act, 1961.

4. The assessee before us is a company engaged in the business of 'extraction, collection, preservation and banking of stem cells'- mainly from dental pulp. As its product brochure, a

copy of which is filed before us as well, indicates, stem cells are master cells that have the potential to become any type of cell in the body and which have the unique trait of self-renewal and multiplication and the potential to develop into other types of cells. These stem cells are said to have potential use in the treatment of several life-threatening diseases, and what is referred to as stem cell banking is the storage of these cells several degrees below the freezing point by way of cryopreservation. Obviously, these things are a bit too technical for laymen to understand, and all that we have done above is a simple reproduction from the product brochure- without having any idea about the authenticity or relevance of what is stated. If this service is to be sold to a potential customer, particularly as it is an expensive service, probably the minimum it needs is a recommendation from a medical practitioner trusted by the potential customer. That is the backdrop in which referral service is paid by the assessee to the medical practitioners who refer the potential customer for availing of the stem cell banking services. The assessee's offer, for this referral plan, is titled 'Introducing an Opportunity to become a Stemade Connect Doctor'- a copy of which is placed before us as well, and this document, inter alia, states as follows:

There is a lot of buzz around us about stem cells being poised as one of the probable sources of futuristic medicine. However, as this concept is very unique, there is a need to create awareness about the 'true potential' of these stem cells among the people.....

If you are one of those who have the conviction in this concept and would like to spread the awareness about the benefits of stem cells among your patients, here is an opportunity to be associated.....The details of the referral plan are given below:

No of clients	Referral amount per client	Professional fees for tooth collection*
xxxxx	xxxxxxx	xxxxxxx

*** If the dentist collects tooth as per Stemade's standard operating procedure**

5. The fees were so paid to the doctors, as referral fees, and were also claimed as a tax-deductible expense under section 37. The Assessing Officer disallowed this expense on the ground that it violates the code of conduct for medical practitioners, and is, as such, inadmissible as a tax-deductible expense being an expense prohibited by law. Aggrieved, the assessee carried the matter in appeal before the CIT(A) but without any success. The assessee is not satisfied and is in further appeal before us.

6. We have heard the parties, perused the material on record and duly considered the facts of the case in the light of the applicable legal position.

7. As observed by Hon'ble Supreme Court, in the case of **Apex Laboratories (supra)** and in the inimitable words of Hon'ble Justice Ravindra Bhatt, "**medical practitioners have a quasi-fiduciary relationship with their patients**" and "**a doctor's prescription is considered the final word on the medication to be availed by the patient, even if the cost of such medication is unaffordable or barely within the economic reach of the patient - such is the level of the trust reposed in doctors**" It was then added that "**Therefore, it is a matter of great public importance and concern when it is demonstrated that a doctor's prescription can be manipulated**". What essentially follows is that when the advice given by a medical professional to his client is influenced by an inducement by someone else, who has a stake in the course of action to be then followed by the client as a result of this advice, it is this undesirable influence which vitiates the performance of medical practitioner's fiduciary duties to

his client, and that is what makes it unethical. When a referral fee is paid to a doctor for advising his client in a particular way so as to benefit the person paying the referral fee, that is clearly unethical and is susceptible to being used to manoeuvre the advice given by the doctor in the performance of his fiduciary duties. That is prohibited by Rule 6.8.1.(d) of the **Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002** which specifically provides that a **“medical practitioner shall not receive any cash or monetary grants from any pharmaceutical and allied healthcare industry for individual purpose in individual capacity under any pretext”**.

8. Learned counsel's defence is that the assessee cannot be treated as part of 'allied healthcare industry' because the description of 'allied healthcare industries' in certain journals and even official websites does not fit on the assessee. This plea is only fit to be noted and rejected. The expressions used in any mode of communication, and particularly in the legal world, have to be interpreted in their context. Given the context in which the expression 'allied healthcare industry' appears in rule 6.8.1, an industry that provides, on a commercial basis, a healthcare-related service or product to a client, is part of the allied healthcare industry- more so when it could benefit from the advice given by the medical practitioner to his client.

9. As to how should such words be construed and how should the law be interpreted, we once again find useful guidance from the Hon'ble Supreme Court in the case of **Apex Laboratories** (*supra*). Referring to the words of Justice Oliver Wendell Holmes **"A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used."** *Tomne v. Eispzer* 245 U.S. 418 (1918)" and adding that it is the elusive nature of words, which lies at the heart of the many issues concerning the interpretation of statutes, Their Lordships have observed as follows:

34. Interpretation of law has two essential purposes: one is to clarify to the people governed by it, the meaning of the letter of the law; the other is to shed light and give shape to the intent of the law maker. And, in this process the courts' responsibility lies in discerning the social purpose which the specific provision subserves. Thus, the cold letter of the law is not an abstract exercise in semantics which practitioners are wont to indulge in. So viewed the law has birthed various ideas such as implied conditions, unspelt but entirely logical and reasonable obligations, implied limitations etc. The process of continuing evolution, refinement and assimilation of these concepts into binding norms (within the body of law as is understood and enforced) injects vitality and dynamism to statutory provisions. Without this dynamism and contextualization, laws become irrelevant and stale.

10. Viewed thus, the hyper-technical plea of the learned counsel does not meet our approval. The expression 'allied healthcare industry' is required to be interpreted in the context in which appears in the code of conduct for the medical practitioners, and not on the basis of how this expression has been defined in some other context in a journal or on website guidelines. We are unable to see any justification for excluding a medical service provider, like the assessee before us, from the segment of the 'pharmaceutical and allied healthcare industry' in the present context.

11. It is then contended that the doctor has rendered a service for which he is being remunerated, and, in that sense, payment of referral fees is not a freebie. There is no merit in this argument either. The doctor is being paid for his services separately, as clearly discernible from the offer documents- extracts from which have been reproduced 4 above, and the referral fees is for his convincing the client to buy the service offered by the assessee company- a

service he ought not to have rendered in the course of, or in the garb of, discharging his fiduciary duties towards his patients. That is where the advice given by him in a fiduciary capacity is sought to be maneuvered to suit the commercial interests of the assessee and that is where the breach of fiduciary duties takes place- something unequivocally disapproved by the Hon'ble Supreme Court and prohibited by the code of conduct applicable on medical professionals.

12. It is then contended that the kind of freebies dealt with by the Hon'ble Supreme Court in the case of Apex Laboratories (*supra*) were in the nature of LCDs, laptops, refrigerators and gold coins etc which are not the same thing as a payment for the rendition of services, and, as such the views expressed by Hon'ble Supreme Court have no application to the facts of this case. That again is a very superfluous way of reading the judgment of our highest, and most revered, judicial forum. One has to read the judgment in totality and attempt to discern the law laid down by Their Lordships. Whatever were the facts of the case being dealt by Hon'ble Supreme Court, the principle laid down by Their Lordships is of the wide ramification which will be equally applicable in all situations in which medical professionals have acted in violation of their code of conduct- in letter and in spirit. It is important to bear in mind the fact that Hon'ble Supreme Court has observed, in very emphatic words, that **".... when acceptance of freebies is punishable by the MCI (the range of penalties and sanction extending to ban imposed on the medical practitioner), pharmaceutical companies cannot be granted the tax benefit for providing such freebies, and thereby (actively and with full knowledge) enabling the commission of the act which attracts such opprobrium"**. Applying this principle to the fact situation that we are dealing with, when the receipt of **"any cash or monetary grants from any pharmaceutical and allied healthcare industry.....under any pretext"** is forbidden for the medical professional and is punishable by the MCI, such pharmaceutical and allied healthcare companies cannot be granted the tax benefit for provides such cash or monetary grants and thereby, actively and with full knowledge, enabling the commission of an act which attracts, to borrow the strong words of disapproval as used by Their Lordships, such "opprobrium". To sum up, in our humble understanding and in the plain words, the law as it stands now-, particularly in the light of the law laid down by the Hon'ble Supreme Court in the case of Apex Laboratories (*supra*), any financial inducement, by freebies or by monetary grants, which vitiates, or has the potential to vitiate, the unbiased performance of fiduciary duties of a medical practitioner to his client is forbidden by the code of conduct for the medical practitioners and is no longer tax-deductible under section 37(1).

13. In a rather recent judgment dated 19th April 2022, in the case of **Peerless Hospitex Hospital & Research Centre Pvt Ltd Vs PCIT [(2022) 137 taxmann.com 359 (Cal)]**, His Lordship of Hon'ble Calcutta High Court, dealing specifically with the referral fee- though in the context of reopening of assessment, has observed that **"Considering the submission of the parties, aims and object of the amended Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, Explanation 1 to Section 37 (1) of the Income Tax Act, 1961, Circular No. 5/2012 dated 1st April, 2012 issued by Central Board of Direct Taxes and the judgment of the Hon'ble Supreme Court in the case of M/s Apex Laboratories Pvt. Ltd. (*supra*) my answer is in negative to the question as to whether Petitioner hospital is eligible and entitled to get deduction on expenditure by way of commission to the doctors as 'referral to doctors' for referring patients for treatment in its hospital as business expenditure under Section 37 (1) of the Income Tax Act, 1961"**. Our view finds support from this judicial precedent.

14. When an unsuspecting client walks into the consulting chamber of a dentist who advises him to go for stem banking from his dental plump, one cannot be sure whether it is the doctor's genuine advice on its merits of what the doctor actually believes to be beneficial to the client or it is a piece of advice influenced by the financial inducement by way of 'referral fee' that the

doctor will get for his client being referred to the service provider in question. Such a situation *de facto* amounts to receipt of cash or monetary grant by the medical professional from the allied healthcare industry, on the pretext of referral fees- in clear violation of rule 6.8.1(d) of the **Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002**. The true consideration for this referral fee is the advice given to the doctor's patient, and a potential customer of the service provider, in favour of stem cell banking. The fiduciary relationship between the doctor and patient is, or has the potential of being, compromised as such by the extraneous considerations. That is clearly contrary to the letter, as also the spirit, of the code of conduct for the medical practitioners. The acceptance of such a referral fee by a medical practitioner is thus forbidden by the legally enforceable code of conduct, which renders it an expense for a purpose that is 'prohibited by law' depriving the assessee company to claim a tax deduction in respect of the said expenditure. We, therefore, approve the conclusions arrived at by the learned Commissioner (Appeals) on this issue, and decline to interfere in the matter.

15. Ground nos. 1 and 2 are thus dismissed.

16. The only other issue raised before us, in the ground no. 3, is against the alleged additional receipts of Rs 75,000 having been brought to tax in the hands of the assessee. Learned counsel of the assessee has now got some material to demonstrate that this receipt was already accounted for, but he fairly admits that this material was not available earlier, and, as such, authorities below had no occasion to deal with the same. Learned Departmental Representative also fairly accepts that this issue can be remitted to the file of the Assessing Officer for fresh examination, and taking an appropriate call in the light of such fresh examination. With the consent of the parties, therefore, the matter stands restored to the file of the Assessing Officer. Ground no. 3 is thus allowed for statistical purposes in the terms indicated above.

17. In the result, the appeal is partly allowed for statistical purposes in the terms indicated above. Pronounced in the open court today on the 20th day of May, 2022.

Sd/-
Sandeep S Karhail
(Judicial Member)
Mumbai, dated the 20th day of May, 2022

Sd/-
Pramod Kumar
(Vice President)

Copies to: (1) *The appellant* (2) *The respondent*
(3) *CIT* (4) *CIT(A)*
(5) *DR* (6) *Guard File*

By order etc

Assistant Registrar/ Sr PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai